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No. 79-1146

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES DELTON PETTY AND
JOE MARTIN NUNEZ-QUINTELA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioners contend that the investigatory stop that led to the discovery of marijuana concealed in their automobile was not justified by an articulable reasonable suspicion.

Petitioners were indicted in the United States District Court for the Western District of Texas on a charge of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). After a hearing, the district court entered an order suppressing the marijuana (Pet. App. 43-48).[1] The court of appeals reversed (Pet. App. 49-85).

[1] The seizure followed a consensual search of the automobile and is not challenged in the petition. At issue is the investigatory stop that preceded the search.

1. On June 21, 1978, petitioners' passenger car was stopped by Border Patrol and Texas Department of Public Safety officers on Bullis Gap Road near its junction with Texas Highway 90. Bullis Gap Road is an unpaved public road approximately 60 miles long, located about 30 miles from the Mexican border. It runs northeast between Highway 90, a paved east-west road, and Highway 385, a paved north-south road that takes off just above the border. There is a Border Patrol checkpoint on Highway 385 approximately 27 miles north of its junction with Bullis Gap Road (Tr. 7-10).

Highway 90 can be reached by staying on 385. In fact, using Bullis Gap Road to reach Highway 90 takes about one hour longer than using Highway 385 (and passing through the checkpoint) (Tr. 14-15). On the stretch of Bullis Gap between the two paved highways, there are no intersections. Except during hunting season (November and December), the road is used almost exclusively by eight families who live on adjoining property (Tr. 10, 15-16).

Bullis Gap Road is rough and unmarked. There are no signs at its junction with Highway 385 indicating that it leads to Highway 90 (Tr. 12). Except for its first 14 miles, the road is poorly maintained and in places virtually impassable. Traversing canyons, rimrock, and a range of small mountains, the road has frequent low water crossings, chuckholes and sandbars. It has no bridges (Tr. 11, 14). Even the families who live along the road avoid its northern end and instead travel south to and along High-

way 385 in order to reach Highway 90 (Tr. 54). Passenger automobiles are rarely seen along the road since local residents use suburbans, pickup trucks and four-wheel-drive vehicles (Tr. 11, 58).

After learning that Bullis Gap Road was being used to circumvent the Highway 385 checkpoint,[2] a Border Patrol officer asked local residents to report to him strangers or suspicious vehicles on the road (Tr. 19). On the day of the investigatory stop involved here, a local resident informed the officer that two sedan-type automobiles, one light blue and one dark blue or black, were proceeding north along the road approximately one hundred yards apart, with one person visible in each vehicle (Tr. 20, 41). With the aid of Department of Public Safety officers, the Border Patrol officer set up an interception point just shy of the junction with Highway 90 (Tr. 21-23) and stopped a light blue automobile containing both petitioners (Tr. 26-27).[3] On the back seat were an inflated spare tire, jack, lug wrench and CB radio. Petitioner Petty said in response to a question that he did not have keys to the trunk. He further asserted that there was nothing in the trunk and in-

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[2] In the fiscal year preceding this stop, 302 illegal aliens were apprehended at the checkpoint (Tr. 18). There are eight unmanned ports of entry along the Mexican border in the vicinity of Highway 385, and innumerable places along the Rio Grande River where the border can be crossed. The river was fordable during the month of June (Tr. 17-18).

[3] A second automobile, dark blue in color, was subsequently found stuck in a low water crossing 20 miles to the south on Bullis Gap Road (Tr. 50-51).

vited the officers to break it open should they doubt him (Tr. 30-31). Instead, the automobile was driven to the Border Patrol office a short distance away on Highway 90 and its trunk entered through the back seat without damaging the lock (Tr. 32, 34). The trunk contained several sugar sacks full of marijuana (Tr. 34).

2. The district court found that the officers did not have "specific articulable facts" rendering their suspicions concerning the automobile "reasonable and well-founded" (Pet. App. 48). On that basis, the stop was held to be illegal and the marijuana was suppressed. The court of appeals, in reversing, found that the circumstances viewed as a whole justified an investigatory stop. These circumstances, as the court described them (Pet. App. 69-76), included the proximity of the beginning of the road to an area suitable for illegal border crossing; recent information that Bullis Gap Road was being used to evade the checkpoint on Highway 385; the fact that the terrain was suited only for pickup truck or four wheel drive vehicles, rarely traversed by strangers, and seldom used even by local residents; and the presence of two passenger automobiles traveling in tandem in a "lead-car-load car" arrangement.

3. Petitioners contend that the stop of their automobile was not grounded on reasonable suspicion and that the court below accordingly erred in reversing the district court's order suppressing the evidence gathered after the stop.

To begin with, this claim is premature. The ruling below places petitioners in the same position they would have occupied had the district court denied their motion to suppress in the first instance. Such an interlocutory order is not subject to pretrial appeal. See *United States* v. *MacDonald*, 435 U.S. 850, 853-863 (1978); *Cogen* v. *United States*, 278 U.S. 221, 222-224 (1929). The considerations that militate against interlocutory appeal of the denial of a motion to suppress also counsel against interlocutory review by this Court. If petitioners are acquitted at trial, their claim will be moot. If, on the other hand, they are convicted and their convictions affirmed, petitioners will then be in a position to present all of their contentions to this Court. *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostoock R. Co.*, 389 U.S. 327, 328 (1967); see *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-258 (1916); see generally *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940).

At all events, the court of appeals correctly decided this case. In *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884-885 (1975), this Court articulated factors officers may consider in determining the existence of reasonable suspicion—"the characteristics of the area in which they encounter a vehicle[,] [i]ts proximity to the border, the usual patterns of traffic on the particular road * * * previous experience with alien traffic * * * recent illegal border crossings in the area * * * obvious attempts to evade officers * * * [a]spects of the vehicle itself." Viewed in terms of

any or all of these factors, the stop of petitioners' automobile was fully justified.

Petitioners argue (Pet. 25) that the officers' suspicion could not have been reasonable since it was formed, and a decision made to stop their automobile, well before the officers personally observed the vehicle making its way along Bullis Gap Road. However, the automobile had been observed by a local resident who, alerted by the Border Patrol, reported what he had seen. Personal observation by the officers would have added nothing to the information he supplied.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[4] Petitioner claims that there is a conflict between this case and *United States* v. *Cortez*, 595 F.2d 505 (9th Cir. 1979), petition for cert. pending, No. 79-404, which held that for suspicion of criminal activity to be reasonable it must be based at least in part on direct observation of inherently suspicious activity. In petitioning for a writ of certiorari in *Cortez* we suggested (Pet. 18) the appropriateness of summary reversal. We do not believe, however, that this case warrants further review regardless of the disposition of *Cortez*. Here, unlike *Cortez*, the Border Patrol focused on a particular automobile in advance of the stop, and did so not only because of the characteristics of Bullis Gap Road and the surrounding terrain, but also in part because petitioners' automobile was seen traveling in tandem with a second automobile in an arrangement common to smugglers. Moreover, as we noted above (page 5, *supra*), there is as yet no final judgment here appropriate for review.

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